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# Supreme Court of The United States

OCTOBER TERM, 1940

No. 727

THE SHAMROCK OIL AND GAS CORPORATION
Petitioner

VS

G. OBIE SHEETS AND CHESTER SHEETS, doing business as FRIONA INDEPENDENT OIL COMPANY, Respondents

On Writ of Certiorari To The United States Circuit Court of Appeals, Fifth Circuit

## BRIEF OF RESPONDENTS

G. Obie Sheets and Chester Sheets, Doing Business as Friona Independent Oil Company

BEN P. MONNING
and
E. BYRON SINGLETON
Amarillo, Texas
Counsel for Respondents.

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**To The Honorable The Chief Justice and Associate Justices of The Supreme Court of The United States:**

G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, Respondents herein, respectfully submit that the judgment of the Honorable Circuit Court of Appeals for the Fifth Circuit, rendered on the 6th day of December, 1940, in this cause should be affirmed. The judgment of the Circuit Court reversing the judgment and ruling of the United States District Court for the Northern District of Texas, Amarillo Division, and directing

that this cause be remanded to the State Court should be affirmed for the reasons hereinafter advanced.

## OPINIONS OF COURTS BELOW

The unreported oral opinion of the United States District Court for the Northern District of Texas, rendered in open court appears on page 108 of Record.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, rendered on December 6th., 1940, appears on page 127 of Record, and is reported in 115 Federal (2d) at page 880.

## OBJECTIONS TO GROUNDS OF JURISDICTION

The statement of Petitioner under its grounds upon which jurisdiction was invoked is substantially correct. Upon the grounds stated and upon the authorities urged jurisdiction is not properly invoked in this cause. Petitioner urges for consideration the case of GAY V RUFF, 299 U. S. 25, 78 Law Ed. 1099, 54 Sup. Ct. 608, 92 A.L.R. 970, which requires the amount in controversy to exceed $3,000.00 except in those cases where jurisdiction is conferred regardless of amount, and likewise requires the petition for removal to be filed in the State Court before the time fixed for answer there. Aside from the question presented in petition for writ of certiorari jurisdiction is lacking as reflected from the record in this case as evidenced in the cross-action and off-set urged by the defendants, respondents herein, wherein the damage clause therein reads "Wherefore defendants and each of them have been damaged in the sum of $5,000.00, which should be allowed as an off-set to any claim which plaintiff may have herein, and in the further sum of $2,200.00, for which defendants pray by way

of cross-action against the plaintiff herein" (Record 68) The petition for removal was not filed in the State Court before the time fixed for answer there, in that the petitioner sued the respondents in the District Court of Potter County, Texas, for the sum of $5,390-42 (Record 1-60); respondents filed their plea of privilege (Record 61); and the venue of the suit was transferred to Parmer County, Texas (Record 62-63); the off-set and counterclaim filed appears in paragraph VI of defendants' answer (Record 67-68); the Circuit Court of Appeals, in its opinion, set forth that the question involved was "it is whether or not a counter-claim set up by a defendant in a State Court, filed by way of defense and for affirmative relief, is a suit which is removable by the plaintiff and cross-defendant under Section 28 of the Judicial Code" (Record 127-128); the pleadings cited reflect an off-set for $5,000.00 by way of a defense and pray for affirmative relief in the amount of only $2,200.00 and being less than $3,000.00, although the prayer (Record 68) asks judgment for $7,200.00 it does not alter the defensive off-set of $5,000.00 and the affirmative cross-action for only $2,200.00, because the question of removability is determined alone by plaintiff's bona fide allegations and the prayer is not a part thereof. HAENNI VS. CRAVEN, 56 Federal (2d) 261; JENNINGS VS. RAY, 7 Fed. Sup. 417; HART VS. MARTIN, 299 S. W. 520; COLLINS VS. MARTIN, 6 S. W. (2d) 126; MORRISSEY VS. JONES, 24 S. W. (2d) 1101; CRETIEN VS. KINCAID 84 S. W. (2d) 1094 affirmed in KINCADE VS. CRETIEN, 111 S. W. (2d) 1098; CITY OF FLOYDADA VS. GILLIAM, 111 S. W. (2d) 761.

## STATEMENT OF THE CASE

The statement of the case as submitted by petitioner is substantially correct, with the following modifications:

Petitioner stated that the Respondents did not question the correctness of the account sued upon, nor deny same under oath as required by Article 3736 of the Revised Civil Statutes of Texas, such as to authorize Respondents to question correctness of the account; that statement is erroneous in that petitioner filed its suit upon a running account, which items totaled $26,066.66, and further setting up the off-sets to the account aggregating $20,676.24, and urging their cause of action for the remainder or difference between the account urged and the off-sets admitted, and being a suit for $5,390.42 (Record 1-60); petitioner's original pleadings take into consideration as one of the lawful off-sets an item known as earnings on a truck (Record 59) and proper credit was given to your Respondents therefor on April 13, 1939 (Record 59) and, likewise, one of the charges upon which it sues relates to the operation of a truck and being a charge item on December 13, 1938, (Record 56) the petitioner's original petition recognized that whatever credits and off-sets existed by virtue of the operation of the truck were called to the attention of the Court in Potter County, Texas, and thereafter to the District Court of Parmer County, Texas, for determination; the opinion of the Circuit Court of Appeals recognized that the $5,000.00 item and the $2,200.00 item were urged by way of defense and for affirmative relief (Record 127-128); the Texas Statute Article 3736, appearing in the appendix, reflects that the

time when a party is required to answer under oath, by written denial, to a proceedings for an itemized verified account is before an announcement of ready for trial in said cause, that point was never reached in the State Court, there was no occasion for that point to have been reached since the petition for removal was urged on appearance day and being the day when the case otherwise would have been set down for a definite day, for trial.

Likewise, what is stated by Petitioner with reference to a claim for $7,200.00 is nothing more or less than Paragraph VI (Record 67-68), which reads as follows:

"And, by way of cross-action and as an off-set defendants and cross plaintiff further say:

On or about the 1st day of February, 1939, plaintiff entered into an agreement with the defendants, and each of them, whereby the defendants were to purchase newer and improved equipment for the transportation of gasoline, and were, in turn, to lease said truck by hauling Shamrock gasoline from Shamrock plants to the various retail establishments created by the plaintiff herein, and were to use said truck and to have the depreciation, up-keep, and cost of operation of said truck paid by the plaintiff and to continue the operation of hauling for plaintiff herein until the sum of $5,000.-00 was earned by the defendants from the operation of said truck in the transportation of gasoline, to be used as an off-set of defendant's account; that immediately thereafter, to induce the defendants, and each of them to expend their funds for such

gasoline truck and transportation equipment, and to cause them to enter into such contract with plaintiff for hauling of such gasoline, plaintiff agreed to allow defendants to continue to operate at least one truck in such manner, whereby plaintiff was obligated to pay the salary of the driver, the cost of operation, depreciation, and up-keep and to yield a sum of approximately $300.00 monthly to the defendants, and that said contract should continue indefinitely, as long as defendants desired to continue making said hauls; that although defendants placed themselves in a position to make such hauls and commenced making such hauls, soon thereafter plaintiff refused to allow defendants to haul its gasoline, and soon thereafter concluded its sale of gasoline to these defendants.

Wherefore, defendants, and each of them, have been damaged in the sum of $5,000.00, which should be allowed as an off-set to any claim which plaintiff may have herein, and in the further sum of $2,200.00, for which defendants pray by way of cross-action against the plaintiff herein."

A probable printing error appears on page 5 of Petitioner's Brief setting forth that the Circuit Court ruled "that the petitioner was entitled to remove this cause to the Federal Court," when we feel sure Counsel for Petitioner intended it to read "was not entitled to remove this cause to the Federal Court."

## Point I

The Honorable Circuit Court of Appeals correctly ruled in its holding that petitioner, being the original plaintiff in a suit filed by it in a State Court, is not such a defendant by reason of the filing of a cross-

action in excess of the jurisdictional amount and involving matters unrelated to plaintiff's original suit as to entitle it under the removal act, as a defendant, to remove the suit presented by the cross-action or counter-claim to the Federal Court.

This point and argument is in direct answer to Petitioner's Specification of Errors I and II.

## ARGUMENT AND AUTHORITIES UNDER POINT I

The opinion from the Honorable Circuit Court of Appeals in this cause properly construes the removal act and historically treats the Congressional changes in the act and we adopt the construction of the Circuit Court relative to the construction of the removal act as such appears in Record pages 129-134 as follows:

> "From 1875 to 1887, the right of removal on the ground of diversity of citizenship was given to plaintiff as well as to defendants. At all other periods since the adoption of the Judiciary Act of 1789, such right was limited to defendants, except under the act of 1867, which applied only to cases where there was the additional ground of prejudice and local influence. At the present time, only the defendant or defendants, being non-residents of the state in which the suit is brought, may remove the suit into the District Court of the United States. In no instance mentioned in said Section 28 is the right of removal expressly conferred upon a plaintiff or cross-defendant.
>
> The removing party here was the plaintiff in the action filed in the state court, and did not become entitled to remove because of set-off or counter-

claim was asserted against it by cross-action. The right to remove is given only to a defendant who has not voluntarily submitted himself to the jurisdiction of the state court, 'not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State law to a cross-action.' The decision to this effect, just cited, was under the Judiciary Act of 1789, but the applicable provision thereof was not materially different from the (fol. 131) present statute, the right of removal then and now being given only to the defendant.

In Waco Hardware Company v. Michigan Stove Co., 91 Fed. 289, wherein the plaintiff in the state court sued for less than the federal jurisdictional amount and was met with a counter-claim for a sum greater than such jurisdictional amount, this court refused to read 'between the lines of the act' and extend to the plaintiff in a state court a right, which, it said, the law clearly intended to give only to the defendant or defendants therein. There are decisions to the contrary, but both reason and the weight of authority seems to us to be against allowing the plaintiff to remove because he becomes a cross-defendant in a controversy between citizens of different states having the requisite jurisdictional amount.

The case of Wichita Royalty Company v. City National Bank is cited by appellee to sustain removal. It involved a federal question and not diversity of citizenship. The cross-bill brought in new parties, including the receiver of an insolvent national bank which had closed its doors since the

original suit was filed; it might and probably (fol. 132) should have been filed as an independent suit; it certainly should have been characterized as a supplemental cross-bill; but be that as it may, this cross-bill was construed by the district court to be 'really a bill to wind up the affairs of the bank.' The Circuit Court of Appeals concurred in this construction, and the jurisdictional point was not mentioned by the Supreme Court in its opinion.

Only defendants may remove, either on the ground of a federal question or by reason of diversity of citizenship. In cases of diversity the right is given only to non-resident defendants. In both cases all of the defendants must join in the petition to remove, except where there is a separable controversy wholly between citizens of different states. In all other respects the statutory provisions with reference to removal are substantially the same in cases involving federal questions as in those depending upon diversity of citizenship; and yet the principle which controlled the decision in West v. Aurora City was not overruled by the decision in Wichita Royalty Co. v. City National Bank, supra, because of the distinguishing facts mentiond in the preceding paragraph.

Although directly in point, it is said that West v. Aurora City is an old case which has lost its value by changes in the statute. Exactly the reverse is true; it has gained in value as an authority by the course of legislation on the subject, because the pertinent provision at this time is the same as when that decision was rendered, and the intervening changes, expanding and then contracting the right

of removal, emphasize the legislative intent to limit it to (fol. 133) the defendant in the statute in force at the present time.

We have seen that the Aurora City case was decided in 1867, when only defendants were given the right to remove. By the act of 1875, supra, the right to remove was extended to either party, and this act, which repealed the provision of the Judiciary Act of 1789 limiting the right of removal to defendants only, necessarily repealed the construction thereof which held that a plaintiff or cross-defendant was not entitled to remove under the act of 1789. The act of 1875, which permitted either the plaintiff or defendant to remove, was repealed by the act of 1887-8, which reenacted the applicable provision of the act of 1789 restricting the right of removal to the defendant or defendants. In readopting that provision, the Congress naturally readopted the construction which had been put upon it in West v. Aurora City, supra. The same provision with the same construction is now a part of Section 28 of the Judicial Code. That interpretation cannot be lightly put aside without violating well-settled rules of statutory construction.

The general purpose of the act of 1887-8, supra, was to contract federal removal jurisdiction; a special purpose was to take away from plaintiffs the right of removal which had been given to them by the act of 1875, supra. This was clearly evidenced by omitting the words 'either party' which had been used in the act of 1875, and employing the words 'defendant or defendants therein being non-residents of the state.' We have, then, this situation: In

1867 the right of removal was limited by statute to non-resident defendants, which statute was held not to include plaintiffs who were also cross-defendants; in 1875 the statute was amended so as to include 'either party,' which, of course, (fol. 134) embraced plaintiffs whether or not they were also cross-defendants; in 1887 the statute was again amended, omitting the use of the words 'either party,' and making no refernce to plaintiffs or cross-defendants, but expressly limiting the right to non-resident defendants. It would not be reasonable to conclude that Congress reenacted the pertinent provision of the law in force in 1867, and rejected the construction which had been put upon that provision by the Supreme Court at that time. If this had been the intention, it might easily have been expressed by adding the words 'cross-defendant or cross-defendants.'

The cases which refused to follow West v. Aurora City because it was under a different law do not mention the distinguishing features. If they did, it would be observed that there is no material difference on the point before us, and that whatever changes were made in 1887 were made with a view of contracting federal removal jurisdiction. In Mackay v. Unita Development Company, 229 U. S. 173, 175, the Supreme Court found 'it unnecessary to consider the status of the parties in the state court and who was technical plaintiff and who technical defendant, or whether Mackay, a non-resident defendant, sued in a state court for $1,950, could, by filing a counter-claim for $3,000, acquire the

right to remove the case to the United States Court.'

It is argued that a non-resident plaintiff, by going into a state court, does not waive his right to remove to the federal court when a counter-claim is filed against him. This is not a question of waiver but of whether or not there was a statutory grant in the first instance; and this is a question of congressional intent. The primary purpose of the act of 1887-8 to cut down jurisdiction was effected by limiting the right of removal to non-resident defendants and by (fol. 135) shortening the time allowed to file the petition to remove.

By the Judiciary Act of 1789, the petition to remove was required to be filed by the defendant at the time of entering his appearance in the state court. By the act of 1875, under which either party was entitled to remove, the filing of the petition was permitted at 'any time before the trial or final hearing.' By the act of 1887-8, which omitted plaintiffs, the petition was required to be filed by the non-resident defendant at or before time he was required to plead in the state court. These statutory alterations and refinements reveal no haphazard policy of the Congress; they disclose a definite legislative purpose, at different periods in our history, first of expanding and then of contracting federal removal jurisdiction.

Section 28 of the Judicial Code names the persons entitled to remove; section 29 provides how any person entitled to remove may exercise the right. He may file a petition in the state court at or before the time the defendant is required to plead

or answer. This provision contemplates the defendant, not the plaintiff, as the party entitled to remove. No time is fixed within which a plaintiff or cross-defendant may petition to remove. In actual practice, the time limit upon filing the petition to remove, designed only for defendants, would generally deny that right to plaintiffs who are made cross-defendants. We should not ascribe to the Congress an implied intention to (fol. 136) accord to cross-defendants a right to remove when the statute under consideration contains a procedural provision which shows that the exercise of such right by plaintiff and cross-defendants was not within the legislative contemplation at the time of enactment.

The judgment appealed from is reversed, and the cause remanded to the district court with instructions to remand the same to the state court from which it was removed."

## Point II

The Honorable Circuit Court of Appeals is correct in its holding that petitioner, being a non-resident original plaintiff filing suit against a resident defendant in a state court for more than $3,000.00 cannot upon appearance of a cross-action in excess of $3,000.00 remove the original suit and the cross-action or counter-claim to the Federal Court.

This point is urged in answer to the authorities submitted by petitioner in support of its Specification of Errors I and II.

## ARGUMENTS AND AUTHORITIES UNDER POINT II

Among those cases cited by Petitioner to authorize its removal we find that in the reading of such authorities the Circuit Courts and District Courts, in their opinions, definitely limt the right of removal upon urging of a cross-action to those cases wherein the original plaintiff was urging a cause of action in a state court, originally, for less than $3,000.00 and being those cases wherein the non-resident original plaintiff was never afforded a chance to have its litigation heard in the Federal Court until the presentation of a cross-action in excess of $3,000.00. Such a fact situation does not exist in the case at bar, in that Petitioner voluntarily instituted its proceedings in the state court, setting up therein an action for $5,390.42, (Record 1-60), and upon the face of the petition originally filed by non-resident petitioner it appears that there is diversity of citizenship and an amount in controversy in excess of $3,000.00, which was submitted by such petition to the jurisdiction of the state court for determination.

In urging the right of removal in the case of BANKERS SECURITY CORPORATION VS. INSURANCE EQUITIES CORPORATION, ET AL, 85 Fed. (2d) 856, 108 A. L. R. 960, we read from the brief of Counsel 108 A. L. R. 961:

"Since plaintiff could not have instituted the action in the District Court of New Jersey in the first instance it is not estopped from removing the action to the Federal Court when it became a de-

fendant by virtue of the defendant's counterclaim." citing:

BALDWIN VS. PACIFIC POWER & LIGHT COMPANY, D. C. 199 Fed. 291; AMERICAN FRUIT GROWERS, INC. V. LA ROCHE, D. C., 39 Fed. (2d) 243.

Petitioner next submits to this Court the opinion in the case of American Fruit Growers, Inc. v. La Roche (1928 D.C.S.C.) 39 Fed. (2d) 243. We note from an examination of that opinion that in that case the plaintiff brought his action in the state court originally for less than $3,000.00; it is reasoned in that case, as follows:

"In the present case, the plaintiff had no choice but to bring its suit in the state court. It, therefore, cannot be said to have waived any right it may have as to any other cause of action."

The Court further stated in its reasoning to authorize a non-resident to have a chance to have its litigation heard in the Federal Court as follows:

"If the removal cannot be had in this case, then a non-resident who has a small claim, less than the jurisdictional amount in the federal courts, against a citizen of another state, must either forego that that claim or must forego his right to a trial in the federal court of any claims that the resident citizen may have against him."

Petitioner urges for consideration the opinion of the District Court of Kansas, rendered in 1928, in the case of SAN ANTONIO SUBURBAN IRRIGATED FARMS V. SHANDY, 29 Fed. (2d) 579, and from that opinion we read:

"Until the coming in of the cross-petition in

this case, the plaintiff had no right to come to a national court. It must either tear up its notes for $3,000 or sue in the state courts. The defendant had an option of pleading defensively only, or filing a cross-petition, asking for affirmative relief. He filed such a cross-petition, asking affirmative relief to the extent of $5,000. This cross-petition will stand, even if plaintiff dismisses its suit. For the first time, then, the non-resident finds itself confronted with a controversy exceeding the jurisdictional amount."

The Shandy case cites the case of WEST V. AURORA, 6 Wall. 139, 18 L. Ed. 819, and argues that that decision was one wherein the amount involved originally was sufficient to enable the plaintiff to have gone into the United States Court at the outset and that since such an option was not present in the Shandy case the right of removal should not be lost. This Shandy case further argues that a non-resident plaintiff who was compelled to go to the State Court in the first instance should be authorized then to remove the cause when confronted with a counter-claim exceeding the jurisdictional amount, and for authority cites:

CARSON LBR. CO. V. HOLTZCLAW, 39 F. 578 (C. C. Mo.);

WALCOTT V. WATSON, 46 F. 529 (C.C. Nev.);

PRICE & HART V. ELLIS & CO., 129 F. 482 (C. C. Ark.);

PIERCE V. DESMOND, 11 F. (2d) 327 (D. C. Minn.);

ZUMBRUNN V. SCHWARTZ, 17 F. (2d) 609 (D. C. Ind.);

CONSOLIDATED TEXTILE CO. V. ISERSON, 294 F. 289 (D.C.N.Y.)

We note that Petitioner in its brief, pages 13-14, outlines numerous authorities, without referring to the opinions of the Courts therein, from these authorities we call the Court's attention to excerpts from the opinions themselves. From MOHAWK RUBBER CO. V. TERRELL, 13 F. (2d) 266, we quote:

"The removal statute (section 1010, U. S. Compiled Statutes 1918) grants the right of removal to 'the defendant or defendants therein to the district court of the United States for the proper district.' It was the purpose of the statute to restrict the right of removal to the defendant or defendants who had no choice in the selection of a forum. It may be that in proper case a litigant, who has been compelled to resort to the state court because of the limited amount in controversy, will enjoy the right, upon the interposition of a counterclaim which is in its nature an independent suit, to remove to the federal court, where the amount is large enough and there is the requisite diversity of citizenship."

From ZUMBRUNN V. SCHWARTZ, 17 F. (2d) 609, we quote:

" . . . Where the original suit is for less than the amount required by the removal statute, and defendant counterclaims for an amount in excess of the amount necessary to allow removal, defendant cannot then demand removal. This seems to be the settled law and is well supported by the authorities. McKOWN V. KANSAS & T. COAL CO. (C. C.) 105 F. 657; LaMONTAGUE V. HARVEY LUMBER CO. (C.C.) 44 F. 645; HANSEN V. PACIFIC

COAST ASPHALT CEMENT CO. (D. C.) 243 F. 283."

In the Zumbrunn v. Schwartz case the Aurora City case was distinguished, setting forth that in the West vs. Aurora City case plaintiff originally sued for more than the jurisdictional amount and hence the plaintiff there could originally have brought his suit in Federal Court but voluntarily chose the forum of the state tribunal; but that in the case at bar, owing to the small amount involved, plaintiff was required to go originally into the state court and that for the first time more than $3,000.00 appeared in the case upon the filing of the cross-action.

The distinction in the WICHITA ROYALTY COMPANY VS. CITY NATIONAL BANK OF WICHITA FALLS, 95 F. (2d) 671, from the case at bar, is set forth in the opinion of the Circuit Court (Record 130-31), and an observation of that case discloses:

"But it is urged that one cause of action, that of the Wichita Royalty Company against the old bank, had been before the state courts for several years and it was too late to remove it, and that the same was true of the suit by the old bank on its notes; and additionally THAT THE OLD BANK COULD NOT REMOVE ITS OWN SUIT. IT IS OF COURSE TRUE THAT NEITHER OF THESE CONTROVERSIES COULD HAVE BEEN INDEPENDENTLY REMOVED AND NEITHER WAS SOUGHT TO BE. They come to the federal court as a part of the case asserted by the Wichita Royalty Company in its new cross bill. That pleading presented for the first time the elements of federal

jurisdiction, and there was no delay in removing thereafter."

From the decision of PIERCE V. DESMOND, 11 F. (2d) 327, wherein the Court cites at length from the opinion of Judge Triber in the case of PRICE & HART VS. T. J. ELLIS & CO., 129 Fed. 482, we submit that the controlling reasons in Pierce vs. Desmond are set out as follows:

"In Price & Hart v. T. J. Ellis & Co., 129 F. 482, (CCED. Ark), Judge Triber states the argument as follows:

'While, under the laws of this state, a defendant is not compelled to set up his counterclaim in that action, but may maintain a separate suit thereon, he has the right to do so, and, as determined by the highest court of the state, it thereupon becomes 'in every respect a cross-action, with the parties reversed.' There is no reason why a nonresident thus involuntarily made a party defendant in an action which judgment for more than $2,000, exclusive of interest and costs, is demanded and can be rendered against him should be deprived of his right to remove the cause to a national tribunal, if he so elects. It is true, he selected the state court as a forum in which to litigate his cause of action when he instituted the suit originally, but, as his claim for which he instituted that suit did not exceed in value the sum of $2,000, exclusive of interest and costs, he had no choice in the selection of the forum, for that was the only court which had jurisdiction of the subject-matter. It was the filing of the counterclaim alone which gave him the right of election, and, if he avails himself of this privilege

within the time prescribed by the statute, 'at or before the time he is required by the laws of the state or the rules of the court to answer or plead,' which can only be done after the filing of the counterclaim, and which must be done 'on or before the calling of the cause for trial, * * * I can conceive of no substantial reason why he should not be entitled to remove the same. * * *

Had the defendants instituted an original action against the plaintiff on their counterclaim, the cause would clearly have been removable, and it was the filing of the counterclaim, although a suit was then pending between the parties, which brought the cause within the terms of the statutes regulating removals of causes from the state to the national courts. The petition for removal in this case was filed by the plaintiff, who became defendants in the cross-action, and were nonresidents of this state, as soon as the facts necessary to confer jurisdiction on this court were made a part of the record, and within the time they were required by the laws of this state to file a reply, and this was the first opportunity they had to elect one of the two forums in which to try their case. Before that time no right of election existed, and, of course, they could exercise none. The motion to remand is overruled'."

From the opinion of Judge Atwell, from the Northern District of Texas, we read from EVETTS V. PEOPLE'S LIFE INSURANCE COMPANY, 36 Fed. (2d) 832:

"The plaintiff contends that the company could have gone into either the national or state court,

and having chosen the state court, it must stay there. Likewise, it is asserted that the plaintiff exhibits a phase of the same matter about which the company was concerned. To use the dangue of learned counsel, it is suggested that the company 'laid its pallet and should rest thereon.'

Written wisdom is not found upon all fours with the question presented here, but is seems to me that the taking of the deposition would not entitle the party who might be interested in the disclosures of the deposition to file a counterclaim or cross-action for an amount in excess of $3,000, and litigate that new cause of action in the state court when the nonresident desired to exercise its right to have the controversy heard in a national court.

The question is not even as difficult as that which arises when a nonresident sues for a sum less than $3,000 in a state court and is met by a cross-action for an amount in excess of $3,000. I think the most satisfactory line of thought upon a predicament of that sort is that the nonresident may remove if and when such a happening takes place. However broad may be the definition of the word 'suit,' it is scarcely broad enough to require that, if a non resident seeks to perpetuate testimony, or to discover testimony concerning a contract in excess of national court jurisdiction, it submits itself in such a proceeding to a cross-action or counter-claim in the domestic court and deprives itself of the right to remove to the national court."

In a well reasoned decision from the Northern District of Maine, we read from the opinion of the Court in HOULTON SAVINGS BANK V. AMERI-

CAN LAUNDRY MACHINE COMPANY, 7 Fed. Sup. 858:

"It is very true that bringing a suit in the state court is an election of a tribunal for the settlement of the rights involved in that suit, and a waiver of any right to change to another jurisdiction. Voluntarily taking the position of a plaintiff would, of itself, on the face of it, deprive that party of the right to remove, under the statute applicable here, in which the right is given to defendants only. In this case, assuming that the replevin suit was actually brought (about which there is some dispute), it was clearly an election to submit the question of the right of possession of the described property, as between the plaintiff and the defendant in that suit, to the court which issued the writ. The defendant here, the laundry company, sued, or started to sue, the hotel company in the state court. If the hotel company had come back with a bill in equity asking that the suit at law be enjoined, the laundry company could not remove thae equity suit to the federal court, though on its face removable, because it had made a clear election to submit the controversy involved to the state tribunal. It had waived its right to carry that controversy into another jurisdiction."

The Circuit Court for the Tenth Circuit in CHAMBERS VS. SKELLY OIL COMPANY, 87 Fed. (2d) 853, in passing on this question simply referred to the opinion in the SAN ANTONIO SUBURBAN IRRIGATED FARMS VS. SHANDY, 29 Fed. (2d) 579, and adopted the reasoning therein stated.

Thus we see from an examination of the decisions

upon which Petitioner relies that those authorities deny the right of a non-resident original plaintiff in the State Court to remove the cause when the original petition filed by such non-resident in the State Court was in excess of $3,000.00 as exists in the case at bar. All of the authorities are in accord, definitely refusing the right of removal to an original non-resident plaintiff, defendant in a counter-claim, when the original non-resident plaintiff instituted suit in the State Court for an amount in excess of $3,000.00.

**Point III**

The judgment of the Honorable Circuit Court of Appeals reversing the judgment of the District Court and directing that this cause be remanded to the State Court is correct for the further reason that the set-off and counter-claim is not such a suit which is removable under Section 28 of the Judicial Code, as amended.

Much of Petitioner's brief is consumed in an attempt to establish that paragraph VI of defendants' answer, Respondents here, was as cross-action and that type of a suit which is removable under Section 28 of the Judicial Code. This feature is treated in Petitioner's brief and under our argument of Point III from the following angles, to-wit:

(a) Was the $5,000.00 off-set a defensive plea as distinguished from an affirmative plea?

(b) Was the $5,000.00 alleged off-set so directly connected with the suit instituted by plaintiff as should be treated a part thereof?

(c) Would the Federal Court have had original jurisdiction over this off-set and counter-claim had same been filed originally in the Federal Court?

## ARGUMENT AND AUTHORITIES UNDER POINT III

The question set forth for determination in the opinion of the Circuit Court in the case at bar was, whether or not a counter-claim set up by a defendant in a state court filed by way of defense and affirmative relief is a suit which is removable by the plaintiff and cross-defendant under Section 28 of the Judicial Code (Record 127-128); the determination by the Circuit Court of Appeals that a non-resident original plaintiff could never become that type of a defendant entitled to removal under Section 28 of the Judicial Code, is supported, as evidenced in Point I and II of Respondent's brief, by the fact not only that petitioner was the non-resident original plaintiff in the State Court, but, likewise, that it was the non-resident original plaintiff instituting a suit in a state court for an amount in excess of $3,000.00; this determination by the Circuit Court made it unnecessary to determine whether or not $5,000.00 of the counter-claim was such a defensive plea as distinguished from an affirmative plea as to deny removal on that ground; likewise, such determination made it unnecessary for the Circuit Court to determine whether or not the $5,000.00 item was so directly connected with the suit originally instituted by plaintiff as to be treated as a part thereof; such a determination by the Circuit Court further made it unnecessary to determine whether or not the Federal District Court could have had original jurisdiction over the purported cross-action and counter-claim. Testing such counter-claim and cross-action by ascertaining whether or not such could have been originally filed in the

Federal District Court, in the event that either of these three points appeared to be lacking removal would be denied and the cause necessarily must be remanded to the State Court from whence it came.

The rule laid down in the case of UNION OIL COMPANY OF CALIFORNIA VS. SPRADLEY, 49 Fed. (2d) 815, is to the effect that a cross-complaint if properly in the case, although it was a cross-complaint for more than the jurisdictional amount, nevertheless, such would not support removal to the Federal Court because removal was sought by the non-resident original plaintiff; the Court, in that case further argued that in the event this cross-complaint was not properly in the case then surely if it was improperly in the case it could not confer jurisdiction on the Federal Court as an independent action.

Only defensive matters were urged with reference to the $5,000.00 contended by non-resident original plaintiff to be a counter-claim, in that such plea did not ask for affirmative relief and did not plead affirmative damages and was strictly in the nature of an off-set, defensive in its nature, setting forth from a legal standpoint that the payment of the $5,000.00 out of the obligation was payable out of a specific fund, which fund had not come into existence.

The damage clause of paragraph VI of Respondents' answer sets forth damages in the sum of $5,000.00, which should be allowed as an off-set to any claim which plaintiff may have herein (Record 68), this allegation itself, being the allegation of damages, evidences that the $5,000.00 should be allowed only upon the contingency that the Petitioner as original plaintiff be successful in its claim for a judgment

on account and does not set forth that same should be allowed as an off-set in any event, but only as one to any claim which plaintiff may have herein.

In begging the question as to what is a defensive off-set and what amounts to an affirmative cross-action the brief of Petitioner reflects that the claim of these Respondents is for $7,200.00, the only place where this is taken from the pleadings of Respondents appears in the prayer of the Respondents, and for the purposes of removal the prayer is not a part of the pleading and the question of removability is determined alone by plaintiff's bona fide allegations, and the prayer to such allegations is not a part thereof.

HAENNI VS. CRAVEN, 56 Federal (2d) 261;
JENNINGS VS. RAY, 7 Fed. Sup. 417;
HART VS. MARTIN, 299 S. W. 520;
COLLINS VS. MARTIN, 6 S. W. (2d) 126;
MORRISSEY VS. JONES, 24 S. W. (2d) 1101;
CRETIEN VS. KINCAID, 84 S. W. (2d) 1094, affirmed in KINCAID VS. CRETIEN, 111 S. W. (2d) 1098;
CITY OF FLOYDADA V. GILLIAM, 111 S. W. (2d) 761.

Removability of a cause of action must be determined by the well pleaded facts of plaintiff's petition as viewed by the laws of state and the matters of defense urged therein furnish no grounds for removal.

BEAUMONT VS. TEXAS & N. O. R. C., 296 Fed. 523;
OHIO EX REL, SENEY VS. SWIFT & CO. 270 Fed. 141;

VISAYAN REFINING CO. VS. STANDARD TRANSPORTATION CO., 17 Fed. (2d) 642;
LEONARD VS. ST. JOSEPH LEAD CO., 75 Fed, 390;
MOULTON VS. NATIONAL FARMERS BANK, 27 Fed. (2d) 403;
MEYER BROS. DRUG VS. DOLLAR, S. S. line, 44 Fed. (2d) 57;
GLOVER MACHINE WORK VS. COOK JELLICO COAL CO., 222 Fed. 531;
LYNCH VS. YELLOW CAB CO., 12 Fed. Sup. 926.

An ascertainment as to whether or not this pleading appearing in Paragraph VI of Respondents' original answer is that type of an off-set amounting to payment, or whether it is that type of a set-off which may be urged either affirmatively or defensively, or as to whether or not such action is simply an affirmative pleading is set forth in 38 TEXAS JURISPRUDENCE 284-286, as follows:

"SET-OFF.—'Set-Off is the doctrine of bringing into the presence of each other the obligations of A to B and B to A, and by judicial action of the court making each obligation extinguish the other. By virtue of the statute, the defendant may avail himself of that juxtaposition and pro tanto mutual cancellation of liabilities by way of defense as well as assert a claim for judgment for any balance there may be in his favor. A set-off is a cross-action or in the nature of a cross-action, and is regarded as a separate suit, or in the nature of a separate suit, by the defendant against the plaintiff in the main suit. Ordinarily, only the defendant may plead in set-off, and when the plaintiff

intriduces a new cause of action in addition to that upon which his suit is brought, it must be done by amendment of his original pleading. But the plaintiff may set up a judgment recovered against him in another suit, and ask that it be credited against the defendant's claim, regardless of whether it is permissible for him to plead a set-off for the defendant.

Except as the rule has been modified by the statute, set-off comprehends only liquidation damages, or those capable of being ascertained by calculation, and in this respect is distinguished from recoupment. It is not as broad or extensive in its scope as a plea in reconvention. And it is also to be distinguished from compensation, which it resembles—the difference being that in set-off the debts are not in themselves, and of right, extinguished; that the right of set-off is merely defensive to the action for the debt; and that the defendant is not obligated to avail himself of it, but may, at his option, pay, or on other grounds contest, the one debt, and bring a separate action for the other.

Set-off is the creation of the statute, but is permissible in equity in some circumstances independently of the statute. It was taken from the civil law, and is unknown to the common law, under which each party is left to his cross-action for the collection of the respective debts."

Many thousands of dollars of charges and many thousands of dollars of off-sets were plead in petitioners' original suit (Record 1-60); and paragraph VI of respondents' answer sought to compel the petitioner, as original plaintiff, to prove under its sworn

account that no other lawful off-sets existed to this account, and specifically set up the contract whereby $5,000.00 of the difference between the off-sets and charges was to be paid by a hauling contract. Allegations in an answer which serve to compel the plaintiff to prove his own cause of action are strictly defensive pleadings and do not present a cross-action or counter-claim.

COMMERCIAL CREDIT COMPANY VS. WILSON, 219 S. W. 298; HOODLESS V. WINTER, 80 Texas 638, 16 S. W. 427.

It has long been ruled that where facts alleged in a cross-bill are purely defensive in their nature and such as may properly be alleged by way of answer no right of removal can be acquired by presenting them in the form of a cross-bill.

FEDERAL CYCLOPEDIA OF PROCEDURE, Vol. 1, page 969;

TORRENCE VS. SHEDD, 144 U. S. 527, 36 L. Ed. 528.

A ready reference to Article 3736, Revised Civil Statutes of Texas, as amended, as disclosed in Note 1 of Petitioner's appendix, reflects that the answer of a defendant in a State Court to a verified itemized statement of account may be sworn to on the day of the trial thereof, and such point was never reached in the State Court. This article requires the plaintiff claiming under the verified account to state in his affidavit that "all just and lawful offsets, payments and credits have been allowed" (Record 60). The $5,000.00 off-set pleaded was such an offset, payment or credit which was defensive to the account sued upon.

Defensive pleas such as payment, off-set, credit, void by reason of violation of the anti-trust statutes, barred by limitations, or any defense going to plaintiff's right to recover either all or any part thereof is permitted under Texas practice even though the verified account was not denied under oath at the time of "announcment for ready for trial in said cause."

McCONNON & CO. VS. KLENK, 11 S. W. (2d) 222;
HOOD VS. ROBERTSON, 33 S. W. (2d) 882;
J. M. BRADFORD GROCERY CO. VS. PORTER, 17 S. W. (2d) 145;
KIMBROUGH VS. VACUUM OIL CO., 289 S. W. 151;
MARATHON OIL CO. VS. HADLEY, 107 S. W. (2d) 883.

In so far as the $5,000.00 item, termed an off-set, is concerned two things must be shown before same could come into existence so as to ripen into a judgment and these factors are: (1) the existence of a cause of action in favor of Petitioner, as original plaintiff, in a sum in excess of $5,000.00; and, (2) the agreement to allow as a credit or an off-set to such account as established by plaintiff an amount in the sum of $5,000.00.

Turning now to the second question urged under Point III it can be readily determined that the $5,000.00 item urged by the Respondents, as defendants below, is directly connected with the suit as instituted by plaintiff, in that it depends upon the existence of a cause of action in favor of Petitioner, as original plaintiff, before it could come into existence, and in the event the Petitioner, original plaintiff below, dismissed its cause of action against the Respondents

there would remain only $2,200.00 in Respondents' pleadings left to be determined. Likewise should the Respondents prevail in their defense that there is a violation of the anti-trust statutes of Texas as urged in their answer, prior to this off-set, (Record 65-67), then the $5,000 item goes out, because as plead it is dependent upon petitioner, as original plaintiff, recovering a sum of more than $5,000.00, to be paid for by specific performance of the hauling contract.

It was held, in MATHIS V. LIGON, ET AL, 39 F. (2d) 455, that

> "A cross-bill is a pleading filed by a defendant in suit against the plaintiff in the same suit or against the other defendants in the same suit, or against both, touching the matters in question in the original bill. It must be either in aid of a defense to the original bill or to obtain full relief to all parties touching the matters of the original bill.
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> MORGAN'S CO. V. TEXAS CENT. RY., 137 U. S. 181, 200, 201, 11 S. Ct. 61, 34 L. Ed. 625; LANDON V. PUBLIC UTILITIES CO. (D.C.) 234 F. 162, 167; 21 C. J., p. 498, sec. 597. Such a cross-bill is ancillary to the original suit and, if the court has jurisdiction of the case made by the original bill, it has jurisdiction of a dependent cross-bill. RICKEY L. & CO. V. MILLER & LUX, 218 U. S. 258, 263, 31 S. Ct. 11, 54 L. Ed. 1032; RAILROAD CO. V. CHAMBERLAIN, 6 Wall. 748, 18 L. Ed. 859, OSBORNE & CO. V. BARGE (C.C.) 30 F. 805; FIRST NAT. BANK OF SALEM V. SALEM CAPITAL FLOUR MILLS (C.C.) 31 F. 580; FREEMAN V. HOWE, 24 How. 450, 460 16 L. Ed. 749; BROOKS V. LAURENT (CCA 5) 98 F. 647, 652."

From the proposition that where jurisdiction is acquired over a claim it attaches also to all matters ancillary and incidental to that claim by necessary impliction has been developed the doctrine that jurisdiction over the original claim embraces power to determine any counter-claim involving the same subject matter as the original claim and dependent on it, so that it relates to substantially the same controversy and its disposition is necesary to afford complete relief to the parties.

MORGAN L. & T. R. & S. S. CO. V. TEXAS C. R. CO., 137 U. S. 171, 34 L. Ed. 625, 11 S. Cr. 61;
RICKEY, L. & C. CO. V. MILLER, 218 U. S. 258, 54 L. Ed. 1032, 31 SCR 11;
AMES REALTY CO. V. BIG INDIAN MIN. CO., (CC-Mont), 146 Fed. 166;
U. S. V. MACKEY, (DC-Okla), 214 Fed. 137;
CLEVELAND E. CO. V. GALION D. M. T. CO., (DC-Ohio), 243 Fed. 405;
BADGER V. E. B. BADGER & SONS CO., (D.C.-Mass.), 288 Fed. 419;
MATHIS V. LIGON, (CCA 10) 39 Fed. (2d) 455.

Thus, it is outlined in MOHAWK RUBBER CP. OF NEW YORK, INC. V. TERRELL, 13 F. (2d) 266, that in an instance wherein plaintiff instituted its suit in the State Court against the defendant, upon an account for goods and merchandise purchased, and sued for $1,672.69, and in due time defendant filed a counter-claim; that a careful examination of the counter-claim shows that it is in its nature an off-set or defensive matter; in that case it was true that the amount demanded in the counter-claim aggregated more than $10,000.00, but it was so inter-

woven with the main issue as to free it from the suggestion of an independent suit. It was there stated that in a proper case, where a litigant was compelled to resort to the State Court originally because of the limited amount in controversy he would enjoy the right, upon imposition of a counter-claim for more than $33,000.00, to remove, provided the counter-claim is in its nature an independent suit.

It will be noted that in the case at bar plaintiff is suing upon a running account, claiming debts in the amount of $26,066.66, and avering that the credits to which defendants were entitled aggregated $20,676.24, the suit by appellee being for the remainder, or $5,390.42; one of the issues which appellee contemplated that the State Court would take into consideration was the earnings on a truck, for which a credit was given, (Record 59), on April 13, 1939, and a debit item relative to the operation of the truck appeared on December 13, 1938, (Record 56); the Petitioner's petition recognized that whatever credits existed by virtue of the operation of the truck were called to the attention of the Court for final determination. Definitely, that which Petitioner now contends to be an independent suit is so inter-twined with and related to the debit and credit items as to be ancillary to the principal cause of action and is in fact of a defensive nature.

It, likewise, has been long established that a suit on a single cause of action is not removable, though a separate issue under a separate defense is raised.

ST. LOUIS & S. F. R. CO V. WILSON, 114 U. S. 60, 29 L. Ed. 66;
54 CORPUS JURIS 293.

Moving then to the third point urged under Point III we see that the cross-complaint or counter-claim, whichever it may be, must necessarily be limited to $2,200.00, which is less than the jurisdictional amount. The only assumption whereby the $5,000.00 item as plead by Respondents, defendants below, could be considered as a cause of action which could have been filed in the Federal Court, originally, is to assume that it was filed for the purpose of asking the Court for a declaratory judgment; a declaratory judgment is not known in Texas law.

Likewise, where an original plaintiff had instituted its cause of action and a cross-action was urged thereto and the original plaintiff attempted to dismiss its original suit and remove the cross-action the Commission of Appeals refused this right, in the case of McELYEA, ET AL V. PARKER, 81 S. W. (2d) 649.

An observation of the pleadings will reflect that this paragraph VI in question, in so far as $5,000.00 thereof is concerned, was a plea of payment and a defensive plea, since no declaratory judgment could be asked for in a State Court of Texas. Reading from 38 TEXAS JURISPRUDENCE 373, supported by the authorities cited therein, we see:

"A sound and safe test for determining whether a claim pleaded by the defendant is to be regarded as a payment and satisfaction pro tanto of the claim of the opposite party, or simply as a counterclaim or set-off which may be asserted in satisfaction thereof, is to inquire whether the defendent could have maintained a suit to enforce the

claim before suit was brought by the plaintiff. If he could have maintained such an independent suit the claim will be regarded as a set-off or counter-claim, and not a payment; while if he could not have maintained such a suit, it is a payment."

## CONCLUSION

Petitioner, as non-resident plaintiff, in the original action, voluntarily selected the forum of the State Court in an action involving in excess of $3,000.00, wherein diversity of citizenship appeared upon the face of the petition as originally filed; for all of the reasons outlined in Point I and Point II of this brief Petitioner is not that type of a defendant to whom is available the petition for removal; likewise, the action sought to be removed is not that type of action which can be removed under the removal act, because such action is so far as it relates to $5,000.00 thereof is a defensive plea as distinguished from an affirmative plea and is so directly connected with the charges and off-sets and the manner of payment thereof as to be a part of the same transaction, and the cause of action, if any there be, as urged by the cross-action is between the identical plaintiff and identical defendant in the original suit filed by petitioner; the purported off-set and cross-action is not that type of an action which could be filed directly in the Federal Court in the first instance.

For the reasons advanced herein it is respectfully urged that the judgment of the Honorable Circuit Court of Appeals herein, should be affirmed, and the

Trial Court should be directed to remand this case to the State Court, for which relief the Respondents pray.

Respectfully submitted,
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and
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P. 2

# SUPREME COURT OF THE UNITED STATES.

No. 727.—October Term, 1940.

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| The Shamrock Oil and Gas Corporation, Petitioner, *vs.* G. Obie Sheets and Chester Sheets, Doing Business as Friona Independent Oil Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. |

[April 28, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent, a citizen of Texas and defendant in a court of that state set up, by way of counterclaim or cross-action against petitioner, the non-citizen plaintiff in the suit, a cause of action for damages in excess of $3,000 for breach of a contract, which was separate and distinct from the alleged indebtedness sued upon by the petitioner. The question for decision is whether the suit in which the counterclaim is filed, is one removable by the plaintiff to the federal district court on grounds of diversity of citizenship under § 28 of the Judicial Code, 28 U. S. C. § 71.

The plaintiff in the state court removed the cause to the United States District Court for Northern Texas, which denied respondent's motion to remand. After a trial on the merits it gave judgment for petitioner, plaintiff below, both on the cause of action set up on its complaint in the suit and on the counterclaim. The Court of Appeals for the Fifth Circuit reversed, 115 F. (2d) 880, and ordered the cause remanded to the state court on the ground that the plaintiff in the state court was not a "defendant" within the meaning of § 28 of the Judicial Code, and so was not entitled to remove the cause under that section, which in terms authorizes the removal of a suit subject to its provisions only "by the defendant or defendants therein". We granted certiorari March 10, 1941, to resolve the conflict of the decision of the court below and that of *Waco Hardware Co.* v. *Michigan Stove Co.*, 91 Fed. 289; see *West* v. *Aurora City*, 6 Wall. 139, with numerous decisions of other circuit courts of appeals. *Carson & Rand Lbr. Co.* v. *Holtzclaw*, 39 Fed.

578; *Bankers Securities Corp.* v. *Insurance Equities Corp.*, 85 F. (2d) 856; *Chambers* v. *Skelly Oil Co.*, 87 F. (2d) 853, and cases cited in note 5 of the opinion below, 115 F. (2d) 880, 882.

We assume for purposes of decision, that if the cause was removable by petitioner, the removal proceedings were regular and timely; that respondent's counterclaim stated an independent cause of action and that the amount in controversy in that action exceeded the jurisdictional amount, and we confine our decision to the question of statutory construction raised by the petition for certoirari.

Petitioner argues that although nominally a plaintiff in the state court it was in point of substance a defendant to the cause of action asserted in the counterclaim upon which, under Texas procedure, judgment could go against the plaintiff in the full amount demanded. *Peck* v. *McKellar*, 33 Tex. 234; *Gimmel & Son* v. *Gomprecht & Co.*, 89 Tex. 497; *Harris* v. *Schlinke*, 95 Tex. 88. But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. *Mason City & Ft. Dodge Ry. Co.* v. *Boynton*, 204 U. S. 570. The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts. Cf. *Hammel* v. *Burnet*, 287 U. S. 103, 110.

Section 28 of the Judicial Code authorizes removal of the suits to which it applies "by the defendant or defendants therein".[1] During the period from 1875 to 1887 the statute governing removals, 18 Stat. 470, specifically gave to "either party" to the suit the privilege of removal. At all other periods since the adoption of the Judiciary Act of 1789 the statutes governing removals have in

[1] "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. . . . And where a suit is brought in any State court, in which there is a controversy between a citizen of the State in which the suit

terms given the privilege of removal to "defendants" alone, except the Act of 1867, 14 Stat. 588, continued as part of § 28 of the Judicial Code, which permits either plaintiff or defendant to remove where there is the additional ground of prejudice and local influence.

Section 12 of the Judiciary Act of 1789, 1 Stat. 79, declared that "if a suit be commenced in any state court against an alien . . . or . . . against a citizen of another state, and the matter in dispute exceeds" the jurisdictional amount "and the defendant shall, at the time of entering his appearance in such state court file a petition for removal of the cause," it shall be removable to the circuit court. In *West* v. *Aurora City*, 6 Wall. 139, this Court held that removal of a cause from a state to a federal court could be effected under § 12 only by a defendant against whom the suit is brought by process served upon him. Consequently a non-citizen plaintiff in the state court, against whom the citizen-defendant had asserted in the suit a claim by way of counterclaim which, under state law, had the character of an original suit, was not entitled to remove the cause. The Court ruled that the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction.

By § 3 of the Act of 1875, the practice on removal was greatly liberalized. It authorized "either party or any one or more of the plaintiffs or defendants entitled to remove any suit" from the state court to do so upon petition in such suit to the state court "before or at the term at which said cause could be first tried and before the trial thereof". These provisions were con-

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is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause. . . . At any time before the trial of any suit in any district court, which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. . . ."

tinued until the adoption of the provisions of the present statute so far as now material, by the Act of 1887, 24 Stat. 552.

We cannot assume that Congress, in thus revising the statute, was unaware of the history which we have just detailed,[2] or certainly that it regarded as without significance the omission from the earlier act of the phrase "either party", and the substitution for it of the phrase authorizing removal by the "defendant or defendants" in the suit, or the like omission of the provision for removal at any time before the trial, and the substitution for it of the requirement that the removal petition be filed by the "defendant" at or before the time he is required to plead in the state court.

We think these alterations in the statute are of controlling significance as indicating the Congressional purpose to narrow the federal jurisdiction on removal by reviving in substance the provisions of § 12 of the Judiciary Act of 1789 as construed in *West* v. *Aurora City, supra.* See H. Rept. No. 1078, 49th Cong., 1st Sess., p. 1. If, in reenacting in substance the pertinent provisions of § 12 of the Judiciary Act, Congress intended to restrict the operation of those provisions or to reject the construction which this Court had placed upon them, by saving the right of a plaintiff, in any case or to any extent, to remove the cause upon the filing of a counterclaim praying an affirmative judgment against him, we can hardly suppose that it would have failed to use some appropriate language to express that intention. That its omission of the reference in the earlier statute to removal by "either party" was deliberate is indicated by the committee reports which recommended the retention of the provisions of the Act of 1867 for removal by either

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[2] See H. Rept. No. 1078, 49th Cong., 1st Sess., p. 1:

"The next change proposed is to restrict the right to remove a cause from the State to the Federal court to the defendant. As the law now provides, either plaintiff or defendant may remove a cause. This was an innovation on the law as it existed from 1789 until the passage of the act of 1875.

"In the opinion of the committee it is believed to be just and proper to require the plaintiff to abide his selection of a forum. If he elects to sue in a State court when he might have brought his suit in a Federal court there would seem to be, ordinarily, no good reason to allow him to remove the cause. Experience in the practice under the act of 1875 has shown that such a privilege is often used by plaintiffs to obtain unfair concessions and compromises from defendants who are unable to meet the expenses incident to litigation in the Federal courts remote from their homes.

"The committee, however, believe that when a plaintiff makes affidavit that from prejudice or local influence he believes that he will not be able to obtain justice in the State court he should have the right to remove the cause to the Federal court. The bill secures that right to a plaintiff."

plaintiff or defendant when an additional ground of removal is prejudice and local influence. See H. Rept., *op. cit., supra*, p. 2.

The cases in the federal courts on which petitioner relies have distinguished the decision in *West* v. *Aurora City, supra*, on the ground that it arose under an earlier statute. But we find no material difference upon the present issue between the two statutes, and the reasoning of the Court in support of its decision is as applicable to one as to the other. In some of those cases it is suggested also that a plaintiff who brings his suit in a state court for less than the jurisdictional amount does not waive his right to remove, upon the filing of a counterclaim against him. And petitioner argues that this is so even when, as in the present case the plaintiff's demand is in excess of the jurisdictional amount. But we think the amount of the plaintiff's demand in the state court is immaterial, for one does not acquire an asserted right by not waiving it and the question here is not of waiver but of the acquisition of a right which can only be conferred by Act of Congress. We can find no basis for saying that Congress, by omitting from the present statute all reference to "plaintiffs," intended to save a right of removal to some plaintiffs and not to others. The question of the right of removal, decided in *Wichita Royalty Co.* v. *City National Bank of Wichita Falls*, 95 F. (2d) 671, 674, on which petitioner also relies, was not presented to or passed upon by this Court. 306 U. S. 103. It involved factors not here present which we find it unnecessary to consider.

Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined". *Healy* v. *Ratta*, 292 U. S. 263, 270; see *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233, 234; *Matthews* v. *Rogers*, 284 U. S. 521, 525; cf. *Elgin* v. *Marshall*, 106 U. S. 578.

*Affirmed.*